

1996

NATIONWIDE PERMIT NO.38

This document constitutes the Environmental Assessment, 404(b)(1) Compliance Review and Statement of Findings for the Nationwide Permit (NWP) described below.

1. CLEANUP OF HAZARDOUS AND TOXIC WASTE. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. Activities undertaken entirely on a CERCLA site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. (Sections 10 and 404)

General conditions of the NWP are contained in the Federal Register. Notification requirements, additional conditions, limitations and restrictions are contained in 33 CFR Part 330.

2. STATUTORY AUTHORITY:

- (a) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403)
- (b) Section 404 of the Clean Water Act (33 U.S.C. 1344)

3. COMPLIANCE WITH RELATED LAWS (33 CFR 320.3):

- (a) General:

NWPs are a type of general permit designed to regulate

certain activities that have minimal adverse effects and generally comply with the related laws in 33 CFR 320.3. While an individual review of each activity authorized by a NWP will normally not be performed, potential adverse effects and compliance with the laws in 33 CFR 320.3 are controlled by the terms and conditions of each NWP, additional provisions, and the review process that is undertaken prior to the issuance of NWPs.

(b) Terms and Conditions:

Specific general conditions of all NWPs provide for a case-by-case review of activities that may adversely affect endangered species or historic properties. Certain NWPs also have a notification requirement that will trigger a case-by-case review of particular activities. Another condition prohibits use of NWPs for activities that are located in wild and scenic rivers. None of the NWPs authorize artificial reefs.

In some cases, activities authorized by a NWP may require other Federal, state or local authorizations. Examples of such cases include but are not limited to: activities that are in or affect marine sanctuaries or marine mammals; the ownership, construction, location and operation of ocean thermal energy conversion facilities or deepwater ports beyond the territorial seas; or the transfer of a lot in a subdivision that is part of a project that requires a DA permit. In such cases, a provision of the NWPs specifies that the NWP does not obviate the need to obtain other authorizations required by law. [33 CFR 330.4(b)]

To further ensure that effects will be minimal, whenever, this NWP is combined with any NWP 12 through 40 a Corps-only PCN is required. The Corps will review such combinations of NWPs to ensure that the individual or cumulative effects are minimal. The Corps believes that combinations of any NWP 1 through 11 which does not already require a PCN, will result in minimal individual and cumulative effects. Therefore, no PCN would be necessary for the stacking of such NWPs.

An additional safeguard is a provision that allows the Chief of Engineers, division engineers and/or district engineers to: assert discretionary authority and require

an individual permit for a specific action; modify NWP's for specific activities by requiring special conditions on a case-by-case basis; add special conditions on a regional basis for certain NWP's; or take action to suspend or revoke a NWP. [33 CFR 330.4(e) and 330.5]

(c) Review Process:

The analyses contained in this document and coordination that will be undertaken prior to the issuance of all NWP's will fulfill the requirements of the National Environmental Policy Act, the Fish and Wildlife Coordination Act and other acts promulgated to protect the quality of the environment.

All NWP's that authorize activities which may result in a discharge into waters of the U.S. require a 401 water quality certification. NWP's that authorize an activity within, or affecting land or water uses within a state that has a Federally approved coastal zone management program must also be certified as being consistent with the state's program. The procedures for compliance of NWP's with these laws are contained in 33 CFR 330.4(c) and (d), respectively.

(d) Public Comment and Response:

For public comment and response see the preamble to the Federal Register notice issuing the Final NWP's.

4. INDIVIDUAL AND CUMULATIVE IMPACTS:

(a) General evaluation criteria:

This evaluation constitutes the public interest review specified in 33 CFR 320.4 (a)(1) and (2), including environmental considerations of the National Environmental Policy Act and the impact analysis specified in Subparts C-F of the 404(b)(1) Guidelines (40 CFR 230).

The evaluation criteria that are relevant to this particular NWP are identified in the following matrixes.

The determination- that a particular factor is relevant or not is based upon consideration of the direct and indirect impacts that can be reasonably attributed to the

authorized activity.

Because NWP's authorize activities on a nationwide basis, it is difficult to predict all of the indirect impacts that may be associated with each individual action. For example, the NWP for a road crossing may be used to fulfill a variety of project purposes. Indication that a factor is not relevant to a particular NWP does not necessarily mean that the NWP would not have an effect on such factor(s), but that it is a factor not readily identified with the authorized activity. In any case, adverse effects will be controlled by the terms, conditions and additional provisions of the NWP. For example, Section 7 consultation will be required for activities that may adversely impact endangered species.

In other cases, factors may be relevant, but have negligible impacts. For example, the impacts of a boat ramp on flood plain values, water level fluctuations or flood hazards.

Factors identified as being relevant, to the extent that potential impacts of the activity determined the terms and conditions of a NWP, are discussed at the end of the matrixes.

(b) Endangered Species:

The Corps believes that the procedures that we have in place ensure proper coordination under Section 7 of the ESA as well as ensuring that threatened and endangered species will not be jeopardized and their critical habitat will not be destroyed. We also believe that current local procedures in Corps districts are effective in ensuring that the ESA is fully complied with under the nationwide permit program. Finally, we have incorporated several additional assurances into the program which have resulted from informal coordination with the Fish and Wildlife Service and the National Marine Fisheries Service.

Under the current Corps regulations for our NWP program (33 CFR 330.4(f)), each district must consider all information made available to it, and information that it has in its own records, to determine whether any listed threatened or endangered species or critical habitat may be affected by the action. Based upon this consideration

and evaluation, the district will initiate consultation with the FWS or NMFS, as appropriate, if the district determines that the activity regulated may affect or the district determines that the action is not likely to adversely affect any endangered species. Consultation may occur under the NWP process or the district may take its discretionary authority to require an individual permit for the action and initiate consultation through the individual permit process. If the consultation is conducted under the NWP process without the district asserting its discretionary authority, then the applicant will be notified that he can not proceed until the consultation is complete. If the district determines that the activity would have no affect on any endangered species, then the district would proceed to issue the NWP authorization.

Corps districts have in most cases established informal or formal procedures with its local counterparts in the FWS and NMFS through which the agencies share information regarding endangered species. Information developed, shared and used by the local Corps and FWS/NMFS offices result in the Corps becoming aware of potential adverse affects on ESA species. In many cases maps are available on the local level that identify locations of populations of endangered species and their critical habitat. Moreover, this NWP involves a level of potential impacts that require a PCN process of coordination with the other agencies, the Corps is now specifically requesting any information that the FWS or NMFS may have on endangered species as part of the PCN consultation. Thus, based on the location of the project an additional level of review now exists for these types of projects. Any information provided through the PCN process will be used by the district to make its may affect, not likely to adversely affect or no affect decision.

In addition to the procedures listed above, each NWP verification includes general condition 11 which states that "no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a critical habitat".

Also, to avoid possible confusion on the part of some applicants Condition 11 has been modified to clarify that this NWP does not authorize the taking of threatened or

endangered species. This should help ensure that applicants do not mistake the Corps permit as a Federal authorization that would allow the taking of threatened or endangered species.

Based on the above the Corps has determined that this NWP will have no effect on threatened or endangered species or their critical habitat.

Although the Corps continues to believe that these existing procedures ensure that the ESA is complied with, we will take the following additional steps to provide further assurance. First, although not required to, the Corps will request programmatic formal Section 7 consultation with the FWS and NMFS as a precaution to further ensure that there is no effect. We intend that formal consultation will be concluded as soon as possible but not to exceed two years from the date of issuing the revised and reissued NWPs. Second, the Corps will direct the district offices, in writing, to meet with appropriate local representatives of the FWS and NMFS and establish or modify existing procedures to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat in its district. This will ensure that districts have the best information available to make decisions regarding whether a specific activity may affect an endangered species and thus whether or not to initiate consultation. The Corps districts can also establish through local procedures, regional conditions or other means of additional consultation for areas of higher likelihood that a permitted activity may affect an endangered species.

(c) Public interest review (320.4(a)(1)):

<u>FACTOR:</u> <u>ACTION:</u>	<u>RELEVANT TO THIS</u>	
	<u>YES</u>	<u>NO</u>
<u>Conservation</u>	X	
<u>Economics</u>	X	
<u>Aesthetics</u>	X	
<u>General environmental concerns</u>	X	

Wetlands	X
Historic properties	X
Fish and wildlife values	X
Flood hazards	X
Flood plain values	X
Land use	X
Navigation	X
Shore erosion and accretion	X
Recreation	X
Water supply and conservation	X
Water quality	X
Energy needs	X
Safety	X
Food and fiber production	X
Mineral needs	X
Considerations of property ownership	X

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(d) Impact analysis (Subparts C-F):

<u>FACTOR:</u> <u>ACTION:</u>	<u>RELEVANT TO THIS</u>	
	<u>YES</u>	<u>NO</u>
Substrate	X	
Suspended particulates/turbidity	X	
Water	X	
Current patterns/water circulation	X	

Normal water level fluctuations	X
Salinity gradients	X
Threatened and endangered species	X
Aquatic food web	X
Wildlife	X
Special aquatic sites	X
Municipal and private water supplies	X
Water related recreation	X
Aesthetics	X
Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas	X

(e) Potential impacts:

(i) General:

The description of the NWP does not specify the nature of the activities to which it might apply other than those required to effect the containment, stabilization or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority. No limitations have been placed on the volume of fill material, material to be dredged or the size of structures which shall be necessary for completed activity.

Numerous scenarios involving many possible combinations of activities along with combinations of site specific data could be considered here. However, only "typical" situations will be evaluated in order to address impacts of these activities.

The impacts of the activities that will result from implementation of this NWP will vary depending upon the magnitude of the situation related to the hazardous or toxic waste materials.

(ii) Physical, chemical and biological characteristics of the aquatic ecosystem:

Discharge of dredged or fill material, dredging, or construction of structures may result in the destruction of riparian vegetation. Some vegetation may have to be removed prior to construction or as the result of dredging while other vegetation may be crushed as a result of various construction activities or smothered by the placement of fill material. Overhanging riparian vegetation provides shelter, shade, breeding and rearing areas for various fish and other aquatic organisms as well as terrestrial wildlife such as birds and small mammals. It also serves an important role in water quality by shading the water from the intense heat of the sun. Emergent vegetation also provides habitat and food for a wide variety of terrestrial and aquatic organisms. Due to the nature of the activity which is to contain, stabilize or remove hazardous or toxic waste material, the adverse effects of removing or covering the riparian vegetation are expected to be minimal.

During construction of an access structure or fill fish and other motile aquatic organisms are most likely to avoid the construction area. Benthic, immotile or slow moving organisms in the path of equipment and building materials will be destroyed. Some organisms will be smothered by the placement of fill material or when suspended material settles to the bottom. Depending on the construction method used; composition of the bottom; and wind and current conditions during construction, fill material placed in the aquatic system and suspended in the water column will temporarily increase the turbidity of the water. Material could be resuspended in the water column through various stages of the containment, stabilization or removal activity. The plume generated will normally be limited to the immediate vicinity of the disturbance and should dissipate shortly after each phase of the construction activity.

During construction small amounts of oil and grease may

be discharged into the watercourse from construction equipment. The frequency and concentration of these discharges are not expected to have more than minimal adverse effects on overall water quality.

To further minimize adverse effects of the authorized activity, the NWP specifically requires that the general permittee to notify the district engineer at least 30 days prior to beginning work. The permittee is required to submit a proposal of appropriate and practicable measures to mitigate the loss of special aquatic sites, including wetlands. The district engineer may place additional conditions upon the specific activity in order that any intermediate impacts are minimized. The NWP contains general conditions that will trigger special procedures for activities that may adversely affect historic properties or endangered species.

(iii) Effects on human use characteristics:

Dredging, discharge of dredged or fill material or the construction of structures for the containment, stabilization or removal of hazardous or toxic waste materials may alter the visual character of some waterways. The extent and perception of the alteration will vary depending upon the nature of the surrounding area and the values of the public using the waterway. If the hazardous or toxic waste materials and all materials used for containment and stabilization are removed from the site, this impact should be minimal.

Use of the NWP will provide the public with a form of authorization that can be obtained with little delay and paperwork and perhaps result in a more timely resolution to potentially serious situations.

Implementation of the NWP in some locations could compete with recreational uses of a waterbody.

(iv) Cumulative Impacts:

Cumulative impacts of the NWP generally do not depend on the number of times the permit is used on a national basis but on the number of times this NWP and other permits are used within a geographic area. Within a geographic area (e.g., a specific watershed) it may be

determined that the cumulative effects of NWP's have more than minimal adverse effects. The division engineer and the district engineer will monitor and review geographic areas that may have cumulative impacts that are more than minimal. The division engineer and the district engineer have the authority to require individual review of projects or to require special conditions to the permit either on a case-by-case basis or on a regional basis where cumulative impacts are determined to be more than minimal. When a division engineer or district engineer determines that a geographic area may have cumulative impacts that are more than minimal they will use the revocation and modification procedure at 33 CFR 330.5. In reaching the final decision they will compile information on the cumulative adverse effects and supplement this document.

Based upon a survey of division and district offices, we estimate approximately 10900 acres of impacts nationally from all NWP's with approximately 7800 acres of wetland mitigation. We expect that this NWP may be used to authorize approximately 180 containment fills or structures or other stabilization activities per year on a national basis. Of those approximately 70 containment fills or structures or other stabilization activities will have wetland impacts of approximately 50 acres with the Corps requiring approximately 32 acres of compensatory wetland mitigation. The demand for these types of activities could increase or decrease over the five year duration of this NWP. Using the current trend approximately 880 containment fills or structures or other stabilization activities could be authorized over a five year period with wetland impacts of approximately 250 acres and mitigation of approximately 160 acres for those wetland impacts. We expect that the time savings associated with the use of this NWP will encourage applicants to design their project within the scope of the permit rather than request an individual permit which could have a greater adverse impact.

- (f) Additional Public Interest Review Factors 33 CFR 320.4(a)(2):
- (i) Relative extent of the public and private need for the proposed structure or work 33 CFR 320.4(a)(2):

The primary need for the NWP is to assist in achieving a timely containment, stabilization or removal of hazardous or toxic waste materials in aquatic systems.

- (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work:

The objective of the proposed action is to develop a permit that is readily obtained by the public and authorize an activity that has minimal adverse effects on the aquatic environment and overall public interest.

Most situations in which there is an unresolved conflict as to resource use, arise when environmentally sensitive areas are involved (e.g. special aquatic sites, including wetlands) or there are competing uses of a resource (e.g. use of a waterway for commercial versus recreational purposes). The nature and scope of the proposed action as well as the terms and conditions of the NWP minimize the likelihood of such a conflict. In the event that there is a conflict, the NWP contains provisions that are capable of resolving the matter (see sections 1 and 3 of this document).

- (iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited:

The nature and scope of the work authorized by the NWP will most likely restrict the extent of the beneficial and detrimental effects to the area immediately surrounding the activity. Most detrimental effects are associated with construction and will be short term. Unless the structure or work is removed, a permanent effect is alteration of the bottom substrate and secondary effects related to use of the structure or work.

As previously stated, the terms, conditions and provisions of the NWP were developed to ensure that individual and cumulative adverse effects are minimal. Specifically, NWPs do not obviate the need for the general permittee to obtain other Federal, state or local

authorizations required by law. Conditions of the NWP also specify that it does not grant any property rights or exclusive privileges (see section 3 of this document and 33 CFR 330.4 for further information). Additional conditions, limitations, restrictions and provisions for discretionary authority as well as the ability to include activity specific or regional conditions on this NWP provide further safeguards to the aquatic environment and overall public interest. Provisions are also included to allow suspension, modification or revocation of the NWP. Refer to sections 1 and 3 of this document for further information and procedures.

(g) Endangered Species:

The Corps believes that the procedures that we have in place ensure proper coordination under Section 7 of the ESA as well as ensuring that threatened and endangered species will not be jeopardized and their critical habitat will not be destroyed. We also believe that current local procedures in Corps districts are effective in ensuring that the ESA is fully complied with under the nationwide permit program. Finally, we have incorporated several additional assurances into the program which have resulted from informal coordination with the Fish and Wildlife Service and the National Marine Fisheries Service.

Under the current Corps regulations for our NWP program (33 CFR 330.4(f)), each district must consider all information made available to it, and information that it has in its own records, to determine whether any listed threatened or endangered species or critical habitat may be affected by the action. Based upon this consideration and evaluation, the district will initiate consultation with the FWS or NMFS, as appropriate, if the district determines that the activity regulated may affect or the district determines that the action is not likely to adversely affect any endangered species. Consultation may occur under the NWP process or the district may take its discretionary authority to require an individual permit for the action and initiate consultation through the individual permit process. If the consultation is conducted under the NWP process without the district asserting its discretionary authority, then the applicant will be notified that he can not proceed until the

consultation is complete. If the district determines that the activity would have no affect on any endangered species, then the district would proceed to issue the NWP authorization.

Corps districts have in most cases established informal or formal procedures with its local counterparts in the FWS and NMFS through which the agencies share information regarding endangered species. Information developed, shared and used by the local Corps and FWS/NMFS offices result in the Corps becoming aware of potential adverse affects on ESA species. In many cases maps are available on the local level that identify locations of populations of endangered species and their critical habitat.

Moreover, this NWP involves a level of potential impacts that require a PCN process of coordination with the other agencies, the Corps is now specifically requesting any information that the FWS or NMFS may have on endangered species as part of the PCN consultation. Thus, based on the location of the project an additional level of review now exists for these types of projects. Any information provided through the PCN process will be used by the district to make its may affect, not likely to adversely affect or no affect decision.

In addition to the procedures listed above, each NWP verification includes general condition 11 which states that "no activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a critical habitat".

Also, to avoid possible confusion on the part of some applicants Condition 11 has been modified to clarify that this NWP does not authorize the taking of threatened or endangered species. This should help ensure that applicants do not mistake the Corps permit as a Federal authorization that would allow the taking of threatened or endangered species.

Based on the above the Corps has determined that this NWP will have no effect on threatened or endangered species or their critical habitat.

Although the Corps continues to believe that these existing procedures ensure that the ESA is complied with, we will take the following additional steps to provide further assurance. First, although not required to, the

Corps will request programmatic formal Section 7 consultation with the FWS and NMFS as a precaution to further ensure that there is no affect. We intend that formal consultation will be concluded as soon as possible but not to exceed two years from the date of issuing the revised and reissued NWP. Second, the Corps will direct the district offices, in writing, to meet with appropriate local representatives of the FWS and NMFS and establish or modify existing procedures to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat in its district. This will ensure that districts have the best information available to make decisions regarding whether a specific activity may affect an endangered species and thus whether or not to initiate consultation. The Corps districts can also establish through local procedures, regional conditions or other means of additional consultation for areas of higher likelihood that a permitted activity may affect an endangered species.

5. EVALUATION OF COMPLIANCE WITH THE GUIDELINES PROMULGATED UNDER SECTION 404(b)(1) OF THE CLEAN WATER ACT (40 CFR 230):

The 404(b)(1) compliance criteria for general permits is contained in 40 CFR 230.7.

(a) Evaluation Process 230.7(b)(1):

(i) Alternatives 230.10(a):

The consideration of alternatives are not directly applicable to general permits.

(ii) Prohibitions 230.10(b):

This NWP involves various activities, some of which may result in a discharge and require 401 water quality certification. State water quality certification requirements will be met in accordance with the procedures contained in 33 CFR 330.4(c).

No toxic discharges will be authorized by this NWP. Section 404 general condition no. 3 specifically states

that the material discharged must be free from toxic pollutants in toxic amounts.

No adverse impact on endangered species will be authorized by this NWP. Refer to general condition no. 11 and to 33 CFR 330.4(f) for information and procedures.

This NWP will not authorize the violation of any requirement to protect any marine sanctuary. Refer to section 3 of this document for further information.

(iii) Findings of Significant Degradation 230.10(c):

Potential impact analysis (Subparts C-F):

The potential impact analysis specified in Subparts C-F is contained in section 4 of this document.

Evaluation and testing (Subpart G):

Because the terms and conditions of the NWP specify the type of discharges that are authorized as well as those that are prohibited, individual evaluation and testing for the presence of contaminants will normally not be required. If a situation warrants, provisions of the permit allow division or district engineers to further specify authorized/prohibited discharges and/or require testing.

Based upon Subparts B and G, after consideration of Subparts C-F the discharges authorized by this NWP will not cause or contribute to significant degradation of waters of the United States.

(iv) Factual determinations 230.11:

The factual determinations required in 230.11 are contained in section 4 of this document.

(v) Appropriate and practicable steps to minimize potential adverse effects 230.10 (d):

As demonstrated by the information contained in this document as well as the terms, conditions and provisions of this NWP, actions to minimize adverse effects (Subpart H) have been thoroughly considered and

incorporated into the authorization.

(b) Evaluation process 230.7(b)(2):

(i) Description of the permitted activities:

As indicated by the description of the NWP in section 1 of this document and the discussion of potential impacts in section 4, the activities to be regulated by this NWP are sufficiently similar in nature and environmental impact to warrant regulation under a single general permit. Specifically, the purpose of the activity is to provide for the containment, stabilization or removal of hazardous or toxic waste materials from aquatic systems. The nature and scope of the impacts are controlled by the terms and conditions of the NWP.

If a situation arises in which the activity requires further review or is more appropriately regulated under an individual permit, provisions of the NWP allow division and/or district engineers to take such action.

(c) Cumulative effects 230.7(b)(3):

A discussion of cumulative effects, including the number of activities likely to be regulated under this NWP is contained in section 4 of this document.

6. Final Determinations:

(a) Need for an environmental impact statement (FONSI):

Based upon the information contained in this document, issuance of the NWP will not have a significant impact on the quality of the human environment and the preparation of an Environmental Impact Statement is not required.

(b) 404 (b)(1) Compliance:

On the basis of the 404(b)(1) Guidelines (Subparts C-G), the discharges authorized by this NWP comply with the requirements of the Guidelines with the inclusion of appropriate and practicable conditions to minimize pollution or adverse effects on the affected aquatic ecosystems.

(c) Public interest:

Based upon the information presented in this document, issuance of the NWP, as prescribed by the regulations contained in 33 CFR Parts 320 to 330, and 40 CFR 230, is not contrary to the public interest.

(d) Section 176(c) of the Clean Air Act General Conformity Rule Review:

The proposed NWP has been analyzed for conformity applicability pursuant to regulations implementing Section 176(c) of the Clean Air Act. It has been determined that the activities proposed under this permit will not exceed *de minimis* levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. Any later indirect emissions are generally not within the Corps continuing program responsibility and generally cannot be practicably controlled by the Corps. For these reasons a conformity determination is not required for this NWP.

FOR THE COMMANDER:

/signed/
Russell L. Fuhrman
Major General, U.S. Army
Director of Civil Works